communication of the decision of the registrar. The decision of the registrar in this case is the decision to enter the caveat and not the decision to refuse the application for cancellation of the said caveat since para (b) and the second limb of para (c) of s 321 are not relevant in the present case. Therefore, for the purpose of computation of time under s 418, it is crystal clear that time runs from the date of communication of the decision of the registrar to enter the caveat, ie 20 October 1988. The plaintiff's appeal under s 418 was entered on 29 January 1989. Therefore, I hold that the plaintiff's appeal was filed out of time and consequently time barred. The second defendant's (intervener) objection is hereby upheld. There being no application for enlargement of time or submission in the alternative for this court to exercise its inherent jurisdiction to enlarge time, I leave the matter to rest.

I reluctantly dismiss this application, reluctantly because I feel that the continuance of the registrar's caveat may possibly affect the price the land in question would fetch in the auction sale, the amount the plaintiff can hope to recover, and consequently the share of the balance of the proceeds of the sale, if any, that the intervener might possibly hope to gain. The auction price may not be enough even to pay off the sum due to the plaintiff — what more the other sums stated in the court order (dated 7 September 1988). The interest of the Inland Revenue Department might, in retrospect, be best served if the second defendant agrees to the withdrawal of the caveat and apply for the necessary amendments to the court order (dated 7 September 1988) to include the provision for payment of the balance of the proceeds, if any, to the Inland Revenue Department. Though the second defendant (intervener) has the right in law to maintain the status quo and though the plaintiff is technically knocked out by the time bar, the second defendant should, in my opinion, not kill or maim the goose that may lay the forlorn egg which the Inland Revenue Department seeks to lay its hands on. [No order as to costs was made.]

Application dismissed.

Solicitors: *Tan & Tan.*

Reported by *Teo Keang Sood*

Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO 28(42)-176-86
SITI NORMA YAAKOB J
5 FEBRUARY 1990

Companies and Corporations — Winding up — Application to stay petition by majority creditors — Whether wishes of majority creditors reasonable — Whether special circumstances exist to render winding up desirable — Companies Act 1965, s 221(1)

The petitioner in this compulsory winding-up petition is an unsecured creditor who had obtained judgment against the respondent for $240,730.10 with interest and costs. Together with the respondent, the majority creditors opposing the petition are purchasers of the low cost flats that the respondent, as housing developers, are trying to complete on a housing project known as Taman Rishah, at Jelapang, Ipoh, pursuant to a joint venture agreement the respondent had with the owners of the land.

At the hearing of the petition, the opposing creditors sought a stay of the petition for a period of ten months to enable the respondent to complete constructing the flats in Phase IV of the project so that they can fulfill their obligations to the purchasers of the uncompleted flats and in the process settle all outstanding sums due to all their creditors including the petitioner.

Held, staying the petition:

(1) The law on the functions of the court when dealing with a petition for the compulsory winding up of a company is that once a debt has been proved to be unpaid and that the company is insolvent, the petitioner is entitled to a winding-up order.

(2) The creditors' prime facie right to a winding-up order is subject to the discretion provided by the language of s 221(1) of the Companies Act 1965, in that the court may decide not to do so, for instance, where the petition is opposed by a majority of the creditors.

(3) The opposing creditors, particularly the majority purchasers of the flats, have made out a reasonable request to stay the petition for just ten months as the respondent has given their undertaking to have Phase IV completed by then. This will not prejudice the petitioner as the interest on its debt is still running.

(4) No special circumstances have been shown by the petitioner to warrant the winding up being made in its favour.

Cases referred to

1 *Re ABC Coupler & Engineering Co Ltd* [1961] 1 All ER 354 (folld)
2 *Re P & J Macrae Ltd* [1961] 1 All ER 302 (refd)

Legislation referred to

Companies Act 1965 s 221(1)

R Anantham for the petitioner.
MS Murthi for the respondent.
Ng Chew Hor for the opposing creditors.

Cur Adv Vult

Siti Norma Yaakob J: The petitioner in this compulsory winding-up petition is an unsecured creditor who had

obtained judgment against the respondent for $240,730.10 with interest and costs.

It is not denied that the respondent are hopelessly indebted to a large number of creditors, secured or unsecured and the petition is equally supported or opposed by them.

Together with the respondent, the large number of the other creditors opposing the petition are purchasers of the low cost flats that the respondent, as housing developers, are trying to complete on a housing project known as Taman Rishah, at Jelapang, Ipoh, pursuant to a joint venture agreement the respondent had with the owners of the land.

The total value of the debts owed by the respondent to all the opposing creditors amount to over $36m whilst the value of those favouring a winding-up order total just over $5m.

At the hearing of the petition, what the opposing creditors wanted was not to have the petition set aside but merely to seek a stay of the petition for a period of ten months to enable the respondent to complete constructing the flats in Phase IV of the project so that they can fulfil their obligations to the purchasers of the uncompleted flats and in the process settle all outstanding sums due to all their creditors including the petitioner.

The law on the functions of the court when dealing with a petition for the compulsory winding up of a company is that once the debt has been proved to be unpaid and that the company is insolvent, the petitioner is entitled to a winding up order ex debto justitiae. However whilst continuing to recognize the creditors's prima facie right to a winding-up order, there are instances where such right is subject to the discretion provided by the language of s 221(1) of the Companies Act 1965, in that the court may decide not to do so. One of such instances is where the petition is opposed by a majority of the creditors. In *Re ABC Coupler & Engineering Co Ltd*,[1] it was held that in deciding whether to make a compulsory winding-up order, the court should have regard to the wishes of the majority of the creditors, because these wishes, although not conclusive, possess great weight and if they are reasonable, the court should follow them in the absence of special circumstances. See also the case of *Re P & J Macrae Ltd*.[2]

Thus the first matter to be determined is whether the wishes of the majority creditors are reasonable. The area on which work on Phase IV of the project is to be carried out has already been levelled, ready for construction. On 17 August 1989, Malaysia Building Society Bhd has approved a bridging loan of $2m to finance the development. The main contractors have, by their letter dated 30 August 1989, confirmed acceptance of the work to be done on Phase IV and have since moved into the area to develop the infrastructure and are agreeable to advancing a loan of $150,000 to $170,000 to the respondent to tide over the expenses for the preliminaries. Lastly, there are the purchasers themselves who have already obtained end financing and executed the sale and purchase agreements with the respondent. They stand to loose not only the deposits they had made but also the beneficial ownership of the flats they had contracted to purchase.

Under these circumstances, I consider that the opposing creditors, particularly the majority purchasers of the flats, have made out a reasonable request to stay the petition for just ten months as the respondent has given their undertaking to have Phase IV completed by then. In any event, it cannot be denied that the respondent had already completed Phases I-III and giving them further time will not prejudice the petitioner as the interest on its debt is still continuing.

To rebut this test of reasonableness, the petitioner has to show the special circumstances rendering the winding up desirable. This it proceeded to show by stating that the petition had been adjourned three times to enable the respondent to pay up but to date they had failed to do so. Whilst it is true that there were previous adjournments on the petition, the respondent did manage to complete Phase III of the project during the period of indulgence but whilst they were able to satisfy other creditors, namely, the purchasers of the houses constructed on Phase III, they were still not able to settle the debt due to the petitioner.

Admittedly the judgment debt is due to the petitioner since 1986 but when balancing the wishes of the petitioner against the wishes of the purchasers that make up the majority of the creditors, I consider no special circumstances have been shown by the petitioner to warrant the winding up being made in its favour. On those findings, I had ordered a stay for ten months as that was the undertaking given by the respondent that they would be able to complete the flats on Phase IV by that time and with the profits derived, pay out the debt due to the petitioner. On that undertaking, I had then adjourned the petition to 3 September 1990.

Petition stayed.

Solicitors: *Skrine & Co*; *Murthi & Partners*; *Choong Wik Son & Robiha*.

Reported by *Kevin Mathews*